

UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
BEFORE THE HONORABLE ARTHUR S. WEISSBRODT, JUDGE

In Re:	)	Case No. 07-52890-ASW
	)	Chapter 11
THE BILLING RESOURCE, dba	)	
Integretel, a California	)	
corporation,	)	
	)	
Debtor.	)	
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THE BILLING RESOURCE,	)	Adv. No. 07-5156
	)	
Plaintiff,	)	<u>CONTINUED FROM NOV. 21:</u>
	)	<u>PLAINTIFF'S MOTION for</u>
v.	)	<u>ORDER to SHOW CAUSE</u>
	)	<u>REGARDING PRELIMINARY</u>
DAVID R. CHASE, Federal Receiver,	)	<u>INJUNCTION re ORDER to</u>
et al.,	)	<u>STAY ENFORCEMENT of</u>
	)	<u>OMNIBUS ORDER including</u>
Defendants.	)	<u>THE COURT'S RULINGS</u>
	)	
	)	Monday, November 26, 2007
	)	San Jose, California

Appearances:

For POL, Inc.:	Kathryn S. Diemer, Esq. Diemer Whitman & Cardosi, LLP 75 East Santa Clara Street, Suite 290 San Jose, California 95113-1806
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Appearances via telephone:

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Appearances continued on next page.

Appearances via telephone continued:

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From the Federal Trade Commission: Collot Guerard, Esq.  
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John Andrew Singer, Esq.  
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*Motion for Order to Show Cause re Preliminary Injunction*

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1 Monday, November 26, 2007

2:05 o'clock p.m.

2 P R O C E E D I N G S

3 THE CLERK: Please rise.

4 THE COURT: Please be seated. This is the case of  
5 Billing Resource. I'll take the appearances of the lawyer, the  
6 single lawyer in court.

7 MS. DIEMER: Good afternoon, Your Honor. Kathryn  
8 Diemer on behalf of secured creditor POL.

9 THE COURT: Yes. And on the phone, Mr. Sacks, may I  
10 have your appearance?

11 MR. SACKS: Steven Sacks, Sheppard Mullin, for the  
12 debtor.

13 THE COURT: Mr. Oetzell.

14 MR. OETZELL: Good afternoon, Your Honor. Walter  
15 Oetzell of Danning, Gill, Diamond and Kollitz on behalf of  
16 federal receiver.

17 THE COURT: Ms. Guerard.

18 MS. GUERARD: Collot Guerard on behalf of the Federal  
19 Trade Commission. And with me is Mickey Mora and John Singer.

20 THE COURT: Neal Goldfarb.

21 MR. GOLDFARB: Your Honor, Neal Goldfarb of Tighe,  
22 Patton in Washington, D.C., also for The Billing Resource.

23 THE COURT: Very good. So is the Federal Trade  
24 Commission going to speak first since there was a question on  
25 the table to the Commission and to the receiver?

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1 MR. FIERO: Your Honor, very quickly, John Fiero for  
2 the committee.

3 THE COURT: Oh, thank you, sir. You weren't on my  
4 list.

5 Is there anybody else on the phone who wasn't on my  
6 list?

7 (No audible response.)

8 THE COURT: No. Okay, go ahead. You didn't have to  
9 do it quickly, Mr. Fiero, I would have called on you. I just  
10 didn't have you on my list.

11 MR. MORA: Thank you, Your Honor. Michael Mora for  
12 the Federal Trade Commission.

13 THE COURT: Thank you, sir. Go ahead.

14 MR. MORA: Your Honor, the Commission appreciates the  
15 Court's attempt to bring the parties together in a settlement.  
16 And also Mr. Sacks did circulate a written proposal to us over  
17 the weekend. We did have time to deliberate and consider Your  
18 Honor's proposal today. I can report to you that we're not in a  
19 position to accept it.

20 THE COURT: That's fine. But is there something you  
21 will accept? I mean the whole point of it is to try to work  
22 something out. When you were in court, Mr. Mora, you and Mr.  
23 Oetzell stressed to me that as long as the funds were held you  
24 were fine. And, in fact, you even made a proposal. So what  
25 kind of proposal would satisfy you that the funds are going to

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1 be held so –

2 MR. MORA: Well, Your Honor, I'm not sure what Your  
3 Honor is referring to, but in fact we never made – well, Your  
4 Honor, we never made a proposal like this and actually we did  
5 not.

6 THE COURT: Well, I think Mr. Oetzell did in fact.  
7 And he's –

8 MR. MORA: Yeah, –

9 THE COURT: And he, in fact, represents the receiver  
10 and the receiver is the only one going for contempt proceedings,  
11 so I think that's incorrect.

12 MR. MORA: Your Honor, we did make such a proposal.  
13 The Commission did not.

14 THE COURT: Well, I don't know whether Mr. Oetzell  
15 speaks for the receiver in this context, but my very firm  
16 recollection is Mr. Oetzell made that proposal. He said – well,  
17 why don't we hear from Mr. Oetzell.

18 MR. OETZELL: Your Honor, thank you. We also  
19 appreciate Your Honor's efforts in this and we appreciate Mr.  
20 Sacks' circulating his proposal. Obviously what we're concerned  
21 about is several things. Number one, the funds being preserved.  
22 Number two, inconsistent rulings between what's going on in  
23 Florida and in front of Your Honor. Three, rendering the  
24 Eleventh Circuit's efforts somewhat meaningless, particularly  
25 since the debtor did invoke the jurisdiction of the Eleventh

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1 Circuit.

2 And what we would ask for or be amenable to is if a  
3 stay there needs to be, that that stay be until the Eleventh  
4 Circuit decides the issues here, that the funds be kept in a  
5 blocked account during that time and, you know, we would like to  
6 have an interest in that account if possible, and that the funds  
7 are neither subject to a motion to release or an adversary  
8 proceeding to determine the status or ownership.

9 The concerns about the motion to release is that again  
10 you've got the problems of rendering the Eleventh Circuit's  
11 efforts meaningless and 'We need to spend the money' is not an  
12 excuse and will not serve as an excuse if it turns out that the  
13 Eleventh Circuit takes it upon themselves to rule that they are  
14 our funds.

15 And, again, in respect of them not being subject to an  
16 adversary proceeding in front of Your Honor to determine the  
17 status or ownership, again that avoids, you know, conflicting  
18 results between the Eleventh Circuit and a possible ruling from  
19 the Bankruptcy Court. That's what we would be looking for, Your  
20 Honor.

21 THE COURT: Okay. So there's no amount of time, for  
22 example, that I can promise you – of course the debtor would  
23 have to agree – but there's no matter of time, a month, that  
24 they won't be dissipated without you having notice for a month  
25 so that if you need to go to an appellate court you could go to

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1 an appellate court, that would satisfy you? If we said they're  
2 going to stay in a blocked account; they won't – they will not  
3 be removed pending decision by the Eleventh Circuit; however, if  
4 the debtor has an emergency the debtor can come to this Court,  
5 on a month's notice to you, and seek to release some or all of  
6 the funds with the understanding that you have all the rights  
7 that you have today?

8 MR. MORA: We appreciate that, Your Honor, but that  
9 would involve the very real possibility that funds that are not  
10 the debtor's would be spent.

11 THE COURT: How could that be if – you're in that  
12 position now. I don't understand. You're in that position now  
13 with a hearing on December 7th and the possibility of spending  
14 them on December 14. And here we are toward the end of  
15 November. So if you had a month warning you would be in a  
16 better position than you are today.

17 MR. MORA: I understand, Your Honor. However, you  
18 know, the issue remains the same and – and what we would like to  
19 be removing in exchange for a stay is that concern, that the  
20 funds would be spent and –

21 (The Court and Clerk confer. Static on the line.)

22 MR. MORA: – give the Eleventh Circuit a chance to  
23 rule on the issue.

24 (The Court and Clerk confer.)

25 THE COURT: Does somebody have a cellphone on? Is

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1 there anybody in court who has a cellphone on? No.

2 THE CLERK: On the phone.

3 THE COURT: Is there anybody on the phone who has a  
4 cellphone on? We're getting static here. Could you please  
5 answer my question if you do?

6 MS. GUERARD: No, Your Honor – or at least Collot  
7 Guerard doesn't.

8 MR. OETZELL: I have a cellphone near the phone. I  
9 will now remove everything that could be offending.

10 THE COURT: You have to remove everything that could  
11 be offensive. I don't know what's in your office, but the  
12 cellphone would be a good start.

13 MR. OETZELL: Well, that and a – and a PDA, and there  
14 you have it. It's done.

15 THE COURT: Okay. Thank you.

16 So, again, Mr. Oetzell, I understand you'd like to  
17 remove the concern, but the concern exists now. And so if I  
18 give you more time than you have now you're still not willing to  
19 go for it.

20 MR. OETZELL: I understand, Your Honor, but, you know,  
21 time is one thing and assurance is along thing and it's the  
22 assurance that, you know, we think would be the appropriate –  
23 would be the appropriate thing to get.

24 THE COURT: Okay. Now where are you, Mr. Sacks?

25 MR. SACKS: Well, I guess we're not very far given the



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1 response of the FTC and the receiver. We circulated a proposed  
2 stipulation to them that really embodied what the Court  
3 discussed last week in terms of timing and said that the FTC and  
4 the receiver wouldn't seek to enforce the omnibus order so long  
5 as the Bankruptcy Court hadn't tried – hadn't released the  
6 funds. So that wasn't acceptable – or at least we heard from the  
7 receiver and today we've heard from the FTC that that's not  
8 acceptable. So as best I can tell they would rather be enjoined  
9 and fight the battle in the appellate courts to determine  
10 whether they have rights that we don't think they have.

11 THE COURT: Yeah, but you're assuming I'm going to  
12 enjoin them.

13 MR. SACKS: I'm assuming that, but if the Court –

14 THE COURT: That's – that's not necessarily what's  
15 going to happen. It may happen, but that isn't necessarily  
16 what's going to happen.

17 MR. SACKS: Well, if the Court doesn't enjoin them, if  
18 no preliminary injunction issues, then they can seek the entry  
19 of an order of contempt against us in the Florida District Court  
20 and we can fight that fight there, I guess, unless we have some  
21 appellate alternatives of our own, but – you know, from this  
22 Court. But –

23 THE COURT: I just wonder how serious your need for  
24 this 1.7 million is. What they're asking you to agree to is  
25 agree to let the Eleventh Circuit rule. Now if you have a real

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1 need for this 1.7 million, then it becomes – that becomes the  
2 primary motivating factor worth risking contempt or worth  
3 fighting about contempt with. If you don't, then it may be much  
4 ado about nothing.

5 MR. SACKS: Well, two things. I think we will have a  
6 need for the funds and I think that we don't agree that the  
7 Eleventh Circuit is the place to decide what is property of the  
8 estate.

9 THE COURT: Right. I don't – I understand that  
10 argument.

11 MR. SACKS: So there isn't any point in waiting for  
12 the Eleventh –

13 THE COURT: But they're saying that they're willing to  
14 allow me to do it in the context of an adversary here. That's  
15 what I understood Mr. Oetzell to say, they're willing to let me  
16 decide what constitutes property of the estate. So it's just  
17 that first issue about the need for the funds before the  
18 Eleventh Circuit does whatever the Eleventh Circuit is going to  
19 do. And you could file your adversary tomorrow.

20 MR. OETZELL: Your Honor, we – the idea was is that  
21 it's the Eleventh Circuit that's deciding because we would like  
22 to avoid inconsistent rulings as between you and the Eleventh  
23 Circuit. Now I can't keep them from filing their adversary  
24 proceeding, but, you know, I don't necessarily have to agree to  
25 it.

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1 MR. SACKS: This is Steven Sacks, Your Honor. That's  
2 what I thought is was that they were saying they wanted us not  
3 to proceed by adversary, which is exactly what we've said to  
4 them. We asked them to stipulate to the filing of an amended  
5 complaint in the adversary so that this Court could decide what  
6 property of the estate is, whether the receiver has any interest  
7 in our bank accounts. And, as I understand it, they have  
8 specifically said that they refused to do that.

9 THE COURT: There is a possible alternative order that  
10 I'm considering and that is to not interfere with the transfer  
11 of funds myself. I mean that doesn't mean that the – that you  
12 don't have other appellate avenues. But to enjoin the receiver  
13 from doing anything other than if the receiver gets the funds,  
14 keeping them in a blocked account pending further order of this  
15 Court.

16 Would the receiver agree to that?

17 MR. OETZELL: Your Honor, it's – I would have to check  
18 with the receiver. It does – it doesn't sound unreasonable.  
19 But I would have to check with him.

20 Let me understand. It's that the receiver would not  
21 be enjoined from pursuing the Florida action but the receiver  
22 would hold the funds if they were ordered to be turned over  
23 pending an order of –

24 THE COURT: Of the Bankruptcy Court.

25 MR. OETZELL: The Bankruptcy Court. I would have to

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1 check with the receiver on that.

2 THE COURT: How long does the receiver – do you need  
3 to check with the receiver? I don't know how available the  
4 receiver is, but given that we're dealing with this extended TRO  
5 that you agreed to, I don't want to – I don't want to lose our  
6 jurisdiction over these funds.

7 MR. OETZELL: Well, let's see what I can do.

8 THE COURT: Do you have him in the next room?

9 MR. OETZELL: I wish I did.

10 THE COURT: Okay. So what are we going to do, do you  
11 want me to recess and we'll call you – everybody will call back  
12 in ten minutes? What's practically, what do you want me to do?

13 MR. OETZELL: Let's make it 15 minutes and that should  
14 give me a chance to be in touch if I can get in touch.

15 THE COURT: All right. And then if Mr. Sacks or Mr.  
16 Fiero want to say anything at that point or any of the other  
17 lawyers, that would be fine. But we might as well find out what  
18 his position is.

19 Did somebody want to say something before we find out  
20 what the receiver's position is?

21 MR. MORA: Yes, Your Honor. This is Michael Mora for  
22 the Commission. Your Honor, since this injunction was proposed  
23 to be entered against the Commission as well and since we are –

24 THE COURT: Absolutely.

25 MR. MORA: Right.

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1 THE COURT: Nobody can dissipate the funds pending  
2 further order of the Bankruptcy Court.

3 MR. MORA: Right. So this is something that we also  
4 will have to discuss with our client internally during the  
5 recess.

6 THE COURT: I understand. That's of course  
7 appropriate.

8 Thank you. We'll recess. Ms. Bracegirdle will expect  
9 the operator to come back in in 15 minutes.

10 Operator, are you onboard?

11 THE OPERATOR: Yes, Your Honor.

12 THE COURT: You understand?

13 THE OPERATOR: Yes, Your Honor.

14 THE COURT: Thank you very much. Court is in recess  
15 for 15 minutes.

16 [COUNSEL]: Thank you, Your Honor.

17 (Recess taken from 2:20 p.m. to 2:41 p.m.)

18 THE CLERK: Please rise.

19 THE COURT: Thank you. You may be seated.

20 Yes, Mr. Oetzell.

21 MR. OETZELL: Your Honor, I've talked to the receiver  
22 and we would not object to such – such an order as long as, you  
23 know, it's without prejudice to our positions to make any and  
24 all argument, including the fact that it doesn't necessarily  
25 confirm to –

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1 THE COURT: I can't hear you. You're started to fade  
2 out. You need to keep your voice up.

3 MR. OETZELL: I'm sorry, Your Honor. I've talked to  
4 the receiver. The receiver would not object to the entering of  
5 such an order, assuming that it was without prejudice to, you  
6 know, our arguing anything, you know, at a later time, including  
7 the jurisdiction did not attend and that, you know, we're  
8 concerned that we would be in a position of conferring  
9 jurisdiction, which we're not – which we don't have the ability  
10 to do. So if it's without prejudice to all of our positions,  
11 with all rights reserved, we would not object to the entry of  
12 such an order.

13 THE COURT: Okay. And how about the Federal Trade  
14 Commission?

15 MR. MORA: Your Honor, first of all, – this is Michael  
16 Mora for the Commission. Your Honor, first of all,  
17 unfortunately we were just rejoined at the end of Mr. Oetzell's  
18 comments, so I caught the end of what he said. I believe I know  
19 what he said, but –

20 THE COURT: Well, Mr. Oetzell, just repeat it.

21 MR. OETZELL: I said that we would not object to the  
22 entry of such an order assuming that – that it was without  
23 prejudice to any position later on that we were – that we could  
24 argue, including that there was no subject matter jurisdiction,  
25 because we were concerned that if – that we would – that

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1 assenting to such a thing would be conferring subject matter  
2 jurisdiction, which we do not have the right to do. So we're  
3 not waiving any arguments.

4 THE COURT: Okay. Go ahead, Mr. Mora.

5 MR. MORA: Thank you, Your Honor. Your Honor, we did  
6 have an opportunity to confer with our client and I have to  
7 report to the Court that this alternative proposed stipulation  
8 is not acceptable to the Commission either.

9 And I just want to reiterate that the Commission was  
10 not a party to the original stipulation that the receiver and  
11 Integretel entered into. We objected to it. It was done over  
12 our objection.

13 We would – we would object to any stipulation like  
14 this alternative proposal and we would simply ask that the Court  
15 enter whatever order it intends to as against the Commission.

16 THE COURT: Okay. So we'll start with you, Mr. Sacks.  
17 With respect to the receiver's contempt proceeding is the  
18 receiver – is the Commission even a party to that?

19 MR. SACKS: That's a question that's hard to answer,  
20 Your Honor. They have filed briefs with respect to that motion  
21 though it is not their original motion. So I'm not sure whether  
22 they take the position they're a party to it or not.

23 THE COURT: Well, okay. Mr. Mora, are you a party to  
24 the contempt proceeding?

25 MR. MORA: Yes, Your Honor, we are. We filed an

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1 extensive brief in support. And, in fact, –

2 THE COURT: Wait a second, Mr. Mora. Does that – the  
3 fact that you filed a brief doesn't confer party status.

4 MR. MORA: Your Honor, we're the real party-in-  
5 interest in the action. The receiver is a court-appointed agent  
6 of the District Court, so, yes, we are a party.

7 THE COURT: Okay. That's what I wanted to know.

8 MR. MORA: The case is *Federal Trade Commission versus*  
9 *Nationwide, et al.*

10 THE COURT: Okay. So go ahead, Mr. Sacks.

11 MR. SACKS: I'm sorry, Your Honor. You wanted me to  
12 go ahead and respond concerning the Court's proposal?

13 THE COURT: Right. And – and whatever you suggest. I  
14 am having serious concerns about enjoining the receiver based on  
15 the possibility, the very real possibility, of inconsistent  
16 rulings between myself and the District Court and myself and the  
17 Eleventh Circuit.

18 Now if I enjoin the distribution of these funds, if  
19 they are turned over to the receiver, and I'm not ordering that  
20 they be turned over to the receiver, I'm just saying if they are  
21 turned over to the receiver, then they can't be dissipated  
22 without further Court order and further order of the Bankruptcy  
23 Court. And that's not – that doesn't give you everything you  
24 want. It doesn't give you the ability necessarily, at least  
25 through my order, to get – to use those funds. And it takes



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1 them out of the jurisdiction of the Bankruptcy Court and puts  
2 them in the receiver's interest-bearing account, pending further  
3 order of the Bankruptcy Court, so it's less secure in that  
4 respect.

5 On the other hand, it doesn't violate or it's not  
6 inconsistent with anything that the District Court has done and  
7 it's not inconsistent with anything that the Eleventh Circuit  
8 has done. So I can issue that order knowing that I'm not in  
9 conflict with another Court's order.

10 MR. SACKS: Well, Your Honor, I think a number of  
11 points. This is Steven Sacks. Several points with respect to  
12 that and, as well, a proposal for how we should proceed.

13 The Court cited us on Wednesday to the case of  
14 *Christopher Village* in the Federal Circuit 2004, 360 F.3d 1319.  
15 And I think *Christopher Village*, which as best I could tell  
16 checking that case and similar cases, is good law for the  
17 proposition that if a court does not have jurisdiction, then  
18 another court considering a matter where it does have  
19 jurisdiction may enter an order that does not take account of  
20 the first court's order, that – that ignores it, in effect,  
21 without running afoul of any rules to the contrary about  
22 collateral estoppel or *res judicata*.

23 And based on that and based on the fact that the  
24 District Court did not have jurisdiction to rule what was  
25 property of the estate and what was not, and –

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1 THE COURT: Well, there's a problem with that. Wait a  
2 minute, Mr. Sacks. The problem with that is that as of the date  
3 the District Court decided that these were property of the  
4 receiver, at least according to the District Court, that was  
5 prepetition. And so it's not exactly clear that prepetition the  
6 District Court didn't have jurisdiction to determine what was –  
7 what belonged to the receiver and what belonged to the  
8 prepetition debtor. And so then you get into the question about  
9 the second order.

10 But if you – if you accept for a moment that the  
11 District Court determined in its first prepetition order that  
12 this was property of the receiver, then your jurisdictional  
13 argument is weaker, much weaker.

14 MR. SACKS: Well, I don't think so, Your Honor,  
15 because I think the Court had a perfect answer to that argument  
16 when we were here on Wednesday which was that merely because a  
17 court has decided prepetition the ownership of something does  
18 not determine what a bankruptcy court then does when faced with  
19 a debtor that has possession, allegedly, of the thing that is  
20 owned by a nondebtor, the other party.

21 THE COURT: Not allegedly.

22 MR. SACKS: Well, –

23 THE COURT: You do have possession.

24 MR. SACKS: Well, that's – well, I guess the problem I  
25 have with this is that the federal court did not really

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1 determine possession of anything that's in our bank account.  
2 There was never any attempt to determine how much was in the  
3 bank account or that any specific funds were property of anyone.

4 THE COURT: Right.

5 MR. SACKS: Instead the federal court's determination  
6 was with respect to a vague concept called reserve funds or a  
7 reserve account, which doesn't exist.

8 THE COURT: But those issues –

9 MR. SACKS: So we might –

10 THE COURT: Those issues are –

11 MR. SACKS: We might want –

12 THE COURT: Those issues are presently before the  
13 Eleventh Circuit, are they not?

14 MR. SACKS: Well, I'm not sure what you mean by "those  
15 issues." But the question of whether the omnibus order is  
16 indeed something that created an obligation at all, whether it's  
17 a valid obligation that the receiver can enforce is before the  
18 Eleventh Circuit, I agree. But I think what is before this  
19 Court is whether the debtor has an interest in its funds in its  
20 bank account. And I think it's unquestionable that this Court  
21 does, that those are property certainly in the possession of the  
22 estate and property of the estate, that the District Court was  
23 never making any ruling about funds in the bank account that  
24 were identified to that action.

25 So I mean we can – we can debate the jurisdictional

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1 issue, but I think there's a sound basis for this Court to  
2 proceed and for its ruling to be upheld if the other parties  
3 want to appeal it. The Court well expressed it in its  
4 memorandum decision and it's obvious that we are threatened by  
5 irreparable harm by what's proposed here.

6 And I wanted to say something about that because I  
7 think that this Court cannot preserve its jurisdiction merely by  
8 saying that the receiver might have to give back the money, if  
9 you will, if this Court makes an order, because the receiver  
10 doesn't recognize this Court's jurisdiction. That's the entire  
11 problem we have. They insist that the District Court has the  
12 only jurisdiction and now the Eleventh Circuit has the only  
13 jurisdiction. And, as a result, making an order that puts the  
14 money in their hands takes it completely out of the Bankruptcy  
15 Court's ability to control the ultimate disposition of the  
16 funds.

17 THE COURT: In other words, -

18 MR. SACKS: We would be right back in front of the  
19 District Court subject to an order, in fact. In fact, it  
20 doesn't even remove the conflicting-order aspect of this, as the  
21 Court suggests that it might because the receiver has continued  
22 to maintain that it is subject to an order to deposit these  
23 moneys in a segregated receivership account subject to the  
24 control of the District Court. So they - they would be, at  
25 best, subject to conflicting orders if this Court says, 'You

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1 only have the money subject to my control.'

2 THE COURT: I understand.

3 MR. SACKS: Now the proposal I wanted to make was that  
4 I think that this Court can reach a resolution of the adversary  
5 proceeding that we filed. We need to amend our complaint to  
6 assert a claim based on the lack of interest that the receiver  
7 has in our bank account. And the Court can then decide that as  
8 a matter of law and summary judgment, and I think it can do that  
9 on an expedited basis. And the entire proceeding can then,  
10 depending on how the Court rules, be subject to appeal. And so  
11 we would propose to do that really almost as soon as the Court  
12 could hear it.

13 THE COURT: Um-hum.

14 MR. SACKS: We think we could have a hearing – we've  
15 already circulated a proposed amended complaint and asked the  
16 parties to stipulate to its filing. If they won't stipulate the  
17 Court could hold a hearing on certainly shortened time to do  
18 that.

19 THE COURT: Why do they have to stipulate to your  
20 filing a complaint?

21 MR. SACKS: Well, we have a complaint. That's a –  
22 there already is an adversary proceeding. That's what this case  
23 is – that's what this motion is being filed in. And our  
24 original adversary did not make a claim that the receiver lacked  
25 an interest in the property. We merely sought to enforce the

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1 automatic stay against it. And really assumed that that would  
2 leave it in the Bankruptcy Court's jurisdiction. So at this  
3 point we need to amend the complaint to add that claim to  
4 resolve the existence of a claim of right of ownership or lien.

5 THE COURT: Okay. Does anybody else wish to say  
6 anything?

7 MR. MORA: Your Honor, Michael Mora for the  
8 Commission. I just wanted to respond to the last point.

9 The Commission would not consent to the amendment of  
10 the existing complaint. And that wouldn't resolve anything  
11 because it just puts us back in where we are right now, which is  
12 that again Integretel's simply trying to relitigate the same  
13 issues that have already been litigated in Florida, and it  
14 resolves absolutely nothing. To file an amended complaint to do  
15 the same thing a third time.

16 THE COURT: Ms. Diemer.

17 MS. DIEMER: Yes, Your Honor. As a secured creditor I  
18 am concerned about the possibility that funds which I have a  
19 properly-perfected secured interest in, I on behalf of my client  
20 have a properly-perfected secured interest might go outside the  
21 scope of this Court's jurisdiction. And I think that's a real  
22 and significant risk as this case is teed up.

23 Furthermore, it could end up in the position that my  
24 client would have to be forced to litigate to, you know, in a  
25 worst-case scenario, in the worst-case scenario, should this

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1 matter convert and there be insufficient funds, to pay my client  
2 the remaining security funds that it is owed, we might then be  
3 placed in the position by such an order of being required to go  
4 outside the state of California to litigate those funds in a  
5 foreign circuit, despite the fact that we have both appropriate,  
6 properly-perfected prepetition security and postpetition  
7 security.

8 And I think that that is an unfair and undue burden  
9 upon my client. I could see if the Court was interested in  
10 making such a ruling, that if the ruling were confined to a  
11 separate, segregated interest-bearing account in the state of  
12 California to be held by a third party, or something, fine. But  
13 I don't want to have to, God forbid a worst-case scenario  
14 occurs, to have to go and litigate in the Eleventh Circuit at  
15 great added expense over money that frankly is within the core  
16 jurisdiction of this Court and which should be mine should the  
17 worst-case scenario come to pass. I think it poses a huge and  
18 unfair burden upon the secured creditor in this case.

19 MR. FIERO: Your Honor, this is John Fiero for the  
20 committee.

21 THE COURT: I can barely hear you, Mr. Fiero.

22 MR. FIERO: I'm sorry, Your Honor. This is John Fiero  
23 for the committee. Is that better?

24 THE COURT: Yes.

25 MR. FIERO: Your Honor, it's my expectation that the

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1 debtor would never have agreed to segregate these funds in the  
2 first place in the context of a cash collateral fight had it  
3 known that at some later date the Court would order that the  
4 funds be sent to –

5 THE COURT: I'm not ordering anything, Mr. Fiero.

6 MR. FIERO: Yes, I understand that, Your Honor, but  
7 that was – that's what the receiver has said it will accept.

8 THE COURT: No. Well, the receiver may go – may get  
9 the – you couldn't have been banking on an injunction here. At  
10 that point I even asked you whether I had jurisdiction to issue  
11 the injunction, and you wouldn't give me an answer. So I don't  
12 think you could have been banking on that.

13 MR. FIERO: No, –

14 THE COURT: There's no question that I'm not going to  
15 order the – I don't – I'm not proposing to order the debtor to  
16 transfer any funds. I'm just deciding whether it's appropriate  
17 for me to issue an injunction.

18 MR. FIERO: Your Honor, our position always was, and  
19 you may recall that I mentioned it at the time, that their –  
20 that this was property of the estate and that are, in fact,  
21 cases, different ones, that I mentioned to you different ones  
22 than the ones that you cited to us last week involving landlord  
23 and tenants with expired leases, where the question of property  
24 of the estate remains even after a court has found that a  
25 landlord is entitled to possession of the property.



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1           So I don't think there's any question about this Court  
2           having jurisdiction to determine the property-of-the-estate  
3           question.

4           THE COURT: But wait a second, Mr. Fiero. I think  
5           that I have exclusive jurisdiction to determine what is property  
6           of the estate, too. The question is whether I have jurisdiction  
7           to enjoin the receiver and the FTC from doing what the District  
8           Court has ordered the debtor to do.

9           MR. FIERO: Well, Your Honor, if you – if you find  
10          that it is – that there's a reasonable likelihood of success on  
11          the merits of the essential claim of whether or not it's  
12          property of the estate, certainly there could be no basis for  
13          transferring the money to the receiver, as the order – as the  
14          omnibus order suggests.

15          I mean let's remember that, you know, what if there  
16          had been \$1 in those accounts on the day that the omnibus order  
17          had been entered, would that mean that the extent of the  
18          receiver's claim would be \$1?

19          THE COURT: I thought – well, I don't know how to  
20          answer that, Mr. Fiero.

21          MR. FIERO: And I didn't expect you to, Your Honor. I  
22          just wanted to register for the Court the committee's concern,  
23          which is identical to that of POL, that – that the property of  
24          this estate remain subject to the husbandry, if you will, of  
25          this debtor and this Court's order.

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1 THE COURT: Thank you, sir.

2 MR. GOLDFARB: Your Honor, Neal Goldfarb. Might I  
3 respond to Mr. Mora's statement?

4 THE COURT: Sure.

5 MR. GOLDFARB: Mr. Mora said he's concerned about  
6 relitigating issues that were litigated before the Florida  
7 Court, but in connection with the property-estate issue we're  
8 not relitigating anything because we never had a chance to  
9 litigate that issue before the bankrupt- -- before the District  
10 Court.

11 THE COURT: I am aware of that.

12 MR. GOLDFARB: So I just think, you know, that --  
13 that --

14 THE COURT: Although the District Court purported to  
15 order.

16 MR. GOLDFARB: I'm sorry?

17 THE COURT: The District Court issued an order that  
18 says that this isn't property of the estate. So whether or not  
19 you got a chance to litigate it or not, the District Court  
20 thinks that it's -- that the issue has been adjudicated.

21 MR. GOLDFARB: Well, that's correct in terms of what  
22 the court thinks, but in terms of what this Court, what Your  
23 Honor is -- whether Your Honor's precluded by that, the fact that  
24 we didn't get to litigate it seems to me means that it's not a  
25 conclusive decision.

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1 THE COURT: All right. I want to mention something  
2 else and that is that whether – let me just say it differently.

3 If a court other than the Bankruptcy Court determines  
4 that the automatic stay is not applicable or grants relief from  
5 the automatic stay and gets that decision wrong, then there is  
6 no relief from the automatic stay. The nondebtor party cannot  
7 rely, as I understand the law, on the determination that  
8 something isn't subject to the automatic stay.

9 So that if, for example, the receiver were to pursue  
10 contempt proceedings and if it were ultimately determined that  
11 those contempt are violative of the stay, then the receiver  
12 would be operating at his own risk.

13 THE COURT'S RULING

14 THE COURT: Having said that, counsel, my – my  
15 position on all of this has changed and I'm not willing to issue  
16 an injunction along the lines of enjoining the receiver from, if  
17 you will, obeying the Florida District Court, seeking the  
18 contempt proceeding following the Florida District Court's  
19 order, seeking the debtor to transfer the funds. I'm just not  
20 willing to do it.

21 So with respect to that issue I'm abstaining. You're  
22 perfectly free – I've not decided that on the merits. The  
23 debtor is perfectly free to seek an injunction from or a stay  
24 from the Eleventh Circuit, to go back to the District Court, to  
25 do whatever he wants. And if the debtor wants me to issue an

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1 order denying an injunction so that the debtor can appeal that  
2 order, I'm clearly doing it because I don't think it would be  
3 appropriate for me to do it under the circumstances. And – and  
4 – and I don't even know whether that would be something that the  
5 debtor would conceivably appeal anyway.

6 But I am willing to enjoin the receiver if the  
7 receiver gets possession of the funds from transferring those  
8 funds to anyone in whole or in part absent further order of this  
9 Court, the Bankruptcy Court. And I'm going to go ahead and  
10 issue my findings of fact and conclusions of law on that, and  
11 then you will do whatever you do, all of you.

12 Before the Court is an order to show cause why this  
13 Court should not preliminarily enjoin the continued enforcement  
14 of the omnibus order entered by the Florida District Court  
15 prepetition. The Florida District Court will subsequently be  
16 referred to as the Florida Court.

17 The Court, this Court hereby incorporates the findings  
18 of fact and conclusions of law as set forth in this Court's  
19 Memorandum Decision – Memorandum Decision filed and entered on  
20 November 2nd, 2007, which I refer to as the Memorandum Decision.

21 In the Memorandum Decision this Court declined to rule  
22 on the merits of a preliminary injunction as to enforcement of  
23 the omnibus order since that order at that time was stayed by  
24 the Eleventh Circuit. The Eleventh Circuit lifted that stay on  
25 November 5th, 2007, and this Court granted a temporary

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1 restraining order, enjoining the continued enforcement of the  
2 omnibus order.

3 In addition to today's oral ruling this Court  
4 incorporates this Court's comments made on the record at the  
5 November 16, 2007 hearing as a basis for this Court's ruling.  
6 And I say in addition to today's ruling, but – and the  
7 Memorandum Decision.

8 The receiver argued at the hearing on the order to  
9 show cause regarding a preliminary injunction that this Court  
10 determined that the Barton doctrine did not apply to receiver,  
11 this Court would be sitting, in essence, in review of the  
12 Florida Court because the Florida Court has already determined  
13 that the subject funds are not property of the estate.

14 The Court has thoroughly reviewed the discussion of  
15 the Barton doctrine as set forth in this Court's Memorandum  
16 Decision at pages 38 through 49. In the Memorandum Decision the  
17 Court explained why this – why this Court concluded that the  
18 Barton doctrine is not applicable to this adversary proceeding  
19 and why this Court had jurisdiction to determine that the Barton  
20 doctrine is not applicable under the facts of this case.

21 Nothing in the receiver's opposition to this  
22 preliminary injunction or in receiver's oral argument at the  
23 November 16, 2007 hearing alters this Court analysis as set  
24 forth in the Memorandum Decision.

25 Moreover, other bankruptcy courts have held that the

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1 Barton doctrine does not apply where a bankruptcy trustee seeks  
2 turnover of property of the bankrupt estate from a custodian.  
3 See *In Re Citex, C-i-t-e-x, Corp.*, 302 BR 144 Bankruptcy,  
4 Eastern District of Pennsylvania 2003; *In re Automotive*  
5 *Professionals, Inc.*, 2007 WestLaw 195 8595, Bankruptcy, Northern  
6 District of Illinois, July 3rd, 2007. The facts of this case  
7 are analogous. Here, debtor seeks to enjoin the turnover of  
8 what debtor asserts is property of the estate if compliance with  
9 the Barton doctrine is not required and a motion to compel  
10 turnover of property held by a custodian, compliance with the  
11 Barton doctrine is also not required to enjoin a federal  
12 receiver who seeks to obtain custody over property that is very  
13 likely property of the estate.

14           Should it later be determined that the Barton doctrine  
15 does apply to the receiver and debtor needed to obtain  
16 permission from the Florida Court to sue receiver in this Court,  
17 this Court notes that it's highly likely, as argued by debtor,  
18 that under *In re Crown Vantage, Inc.*, 421 F.3d 963 Ninth Circuit  
19 2005, receiver would seek to – would need to seek relief from  
20 this Court to proceed against debtor in the contempt proceedings  
21 in the Florida Court. This is so because debtor is the debtor-  
22 in-possession of this Chapter 11 bankruptcy case, pursuant to  
23 Bankruptcy Code Section 11011. As a debtor-in-possession of  
24 this bankruptcy case, Bankruptcy Code Section 1107 essentially  
25 grants debtor the rights and powers of a bankruptcy trustee.

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1 And debtor performs the functions and duties of a bankruptcy  
2 trustee serving in a case under this chapter.

3 As a bankruptcy trustee, under *Crown Vantage* debtor  
4 cannot be sued in a foreign jurisdiction, in this case the  
5 Florida Court, without permission of this Court appointing – of  
6 the Court appointing the trustee in this case – in this case –  
7 this Court.

8 So I'm going to repeat that sentence.

9 As a bankruptcy trustee, under *Crown Vantage* debtor  
10 cannot be sued in a foreign jurisdiction, in this case the  
11 Florida Court, without the permission of a court appointing the  
12 trustee, in this case this Court.

13 *Crown Vantage* likely applies even though debtor was  
14 subject to the receiver's motion to compel prepetition. And  
15 this is so because any postpetition action by the receiver  
16 against debtor is also against debtor's bankruptcy estate and  
17 not just against the prepetition debtor. As such, any  
18 postpetition action by receiver is against the debtor-in-  
19 possession, the entity that has the rights and powers of a  
20 bankruptcy trustee and performs the functions and duties of a  
21 bankruptcy trustee serving in a case under this chapter.

22 The FTC argues that the receivership established by  
23 the Florida Court gives Florida *in rem* jurisdiction over the  
24 commingled funds to the exclusion of the bankruptcy estate. The  
25 FTC argues that the Ninth Circuit authority of *CFTC versus Co*

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1 *Petro Marketing Group, Inc.*, 700 F.2d 1279 at 1281 through 1284,  
2 Ninth Circuit 1983, stands for the proposition that the Florida  
3 Court retained jurisdiction postpetition to order the turnover  
4 of subject funds alleged to be property of debtor's bankruptcy  
5 estate and such jurisdiction was not divested by this Court's  
6 jurisdiction. This Court does not agree with FTC's expanded  
7 reading of *Co Petro*.

8 In *Co Petro*, as in every other case cited by the FTC  
9 regarding this issue, the entity that was the subject of the  
10 federal receivership was also the entity that was under  
11 bankruptcy protection. That is not the case in this instance.

12 The Ninth Circuit in *Co Petro* cited to *Collier*  
13 *Bankruptcy Manual* for the proposition that the purpose of the  
14 broad *in rem* jurisdiction of the bankruptcy court is, and I  
15 quote: To render authority and control of the bankruptcy court  
16 paramount and all-embracing to the extent required to achieve  
17 the ends contemplated by the new legislation and to exclude any  
18 interferences by the acts of others or by proceedings before  
19 other courts where such activities or judicial proceedings would  
20 in some way frustrate the jurisdiction of the bankruptcy courts,  
21 1 *Collier Bankruptcy Manual*, Section 3.01 and 3-24, Third  
22 Edition 1982; *Co Petro*, 700 F.2d at 1282.

23 The Ninth Circuit went on to say: Allowing the  
24 District Court to enforce its preliminary injunction by  
25 directing return of the \$60,000 to the receiver would in no way



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1 frustrate the jurisdiction of the Bankruptcy Court. Section 543  
2 of the Act protects the Bankruptcy Court's exclusive  
3 jurisdiction over property of the estate by requiring the  
4 receiver to preserve it and deliver it to the bankruptcy  
5 trustee, 11 USC Section 543, Supplemental 4, 1980; accord *SEC*  
6 *versus First Financial Group*, 645 F.2d at 439.

7 Therefore, Section 1471(e) does not divest the  
8 District Court in this case of jurisdiction to issue an order to  
9 aid the receiver in collecting and preserving property of the  
10 estate, *Co Petro*, 700 F.2d at 1282 to '83.

11 Accord *SEC versus First Financial Group of Texas*, 645  
12 F.2d, 429 at 440, Fifth Circuit 1981. And I quote: To the  
13 extent that the exercise of a district court's jurisdiction  
14 threatens the assets of the debtor's estate, the bankruptcy  
15 court may issue a stay of those proceedings, 11 USC Section  
16 105(a).

17 Additionally, 11 USC Section 543 protects the  
18 bankruptcy court's exclusive jurisdiction over property of the  
19 estate by requiring the custodian of such property to preserve  
20 it and deliver it to the bankruptcy trustee. In light of these  
21 provisions and the ancillary nature of the equitably relief of  
22 appointment of a receiver for the entity in bankruptcy in  
23 regulatory enforcement actions, we do not find that the District  
24 Court's order was made in contravention of the  
25 exclusive-jurisdiction provision of Section 1471(e) – and I've

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1 eliminated a footnote.

2           The facts of *Co Petro* are not the facts of this case.  
3 Here, permitting receiver to continue enforcement of the  
4 turnover order is not an order to aid in collection and  
5 preservation of property of the bankruptcy estate that  
6 subsequently will be turned over to the Bankruptcy Court for  
7 distribution. Indeed, on the contrary, receiver and the FTC's  
8 determination to proceed with the omnibus order will remove and  
9 potentially dissipate over \$1.7 million in what is likely  
10 property of this bankruptcy estate.

11           As the Ninth Circuit pointed out in *Co Petro*, the  
12 district court was not divested of jurisdiction to enforce a  
13 turnover order because permitting the district court to retain  
14 jurisdiction actually aided the bankruptcy estate. That is very  
15 different from the facts that are before this Court.

16           The FTC also asserts that issuing a Section 105  
17 injunction as to the contempt proceeding would exceed this  
18 Court's discretionary authority because the Florida Court's  
19 orders preclude debtor from relitigating the issue of ownership  
20 of the, quote, reserve, unquote, funds, citing *In re Reynoso -*  
21 *Reynoso*, 477 F.3d, 1117, 1121, Ninth Circuit 2007.

22           However, the first criteria for issue preclusion is  
23 not met here, that the issue necessarily decided at the previous  
24 proceeding is identical to the one sought to be relitigated. In  
25 the omnibus order the Florida Court addressed whether the

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1 receiver had a property interest in the abstract, but did not  
2 address to what particular asset that interest attached. The  
3 question of whether receiver could trace his asserted property  
4 interest into any specific funds held by the debtor was not  
5 litigated before the Florida Court.

6 The question here is whether any interest receiver had  
7 at the time of debtor's bankruptcy filing attached to specific  
8 funds or assets now held by the debtor. Thus debtor is not  
9 relitigating the identical issue previously litigated before the  
10 Florida Court.

11 Moreover, this Court is not deciding today whether the  
12 debtor or the receiver owns the subject funds. The Court is  
13 making no decision today as to who owns those funds. Rather,  
14 this Court is only deciding that debtor has a substantial  
15 likelihood of success on the merits of debtor's position that  
16 the subject funds are property of the debtor's bankruptcy  
17 estate. The debtor definitely has a likelihood of success on  
18 the merits of that position. And that would be true regardless  
19 of whether this Court, the Eleventh Circuit, the Ninth Circuit,  
20 or the Supreme Court were ultimately to decide that issue.

21 Receiver finally asserts that debtor has not met the  
22 standards for injunctive relief under Section 105. And, as this  
23 Court will set forth in greater detail, the Court finds that  
24 debtor has met its burden for a Section 105 preliminary  
25 injunction.

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1           The standard for injunctive relief in the Ninth  
2 Circuit is well settled. A party must show either: One, a  
3 likelihood of success on the merits and the possibility of  
4 irreparable injury or, two, the existence of serious questions  
5 going to the merits and the balance of hardships tipping in its  
6 favor, the required showing of harm varies inversely with the  
7 required showing of meritoriousness, *Miss World U.K. Ltd. versus*  
8 *Miss America Pageants, Inc.*, 856 F.2d 1445 at 1448, Ninth  
9 Circuit 1988.

10           In the reorganization context the Ninth Circuit has  
11 said that a debtor seeking a stay against a nondebtor must show  
12 a reasonable likelihood of successful reorganization. As set  
13 forth in detail in the Memorandum Decision at pages 19 through  
14 21, debtor has definitely demonstrated that debtor has and had a  
15 reasonable likelihood of successful reorganization.

16           In addition to those findings, on November 2, 2007,  
17 the committee agreed to an additional two weeks for debtor's use  
18 of cash collateral while debtor and the committee continued  
19 discussions for a plan of reorganization.

20           At the November 2, 2007 hearing no creditor opposed  
21 debtor's use of cash collateral based on the viability or lack  
22 of viability of the debtor's business. No creditor did that.

23           In addition, the Creditors' Committee has consented to  
24 debtor's continued use of cash collateral through November 30,  
25 2007. Only in the – only the FTC and the receiver oppose

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1 debtor's use of cash collateral, and that objection was only on  
2 the basis that both parties objected to debtor using the funds  
3 in the blocked account. No creditor opposed debtor's use of  
4 cash collateral based on the viability of debtor's business.

5 For the reasons stated in the Memorandum Decision and  
6 the additional information brought to the Court's attention at  
7 the November 2, 2007 and November 16, 2007 cash collateral  
8 hearings, debtor has demonstrated that debtor has a reasonably  
9 likelihood of a successful reorganization sufficient for the  
10 issuance of a preliminary injunction.

11 Additionally, as set forth in great detail in the  
12 Memorandum Decision at pages 38 to 58, debtor has demonstrated a  
13 strong likelihood of success on the merits that the property the  
14 receiver seeks to have the debtor turnover pursuant to the  
15 omnibus order is in fact property of the estate. The omnibus  
16 order does not require debtor to pay any specific amount of  
17 funds to the receiver. Rather, in order to comply with the  
18 omnibus order debtor would have to pay receiver out of debtor's  
19 general commingled funds the so-called, quote, reserves,  
20 unquote, the Florida Court determined debtor held on behalf of  
21 the prior customers, the Florida Court describes such reserves,  
22 but certainly did not quantify them.

23 Prepetition debtor did not turn over any funds to the  
24 receiver and debtor did not segregate any such funds in any  
25 fashion. As of the petition date, the debtor retained an

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1 interest in all of the funds in debtor's general bank account  
2 and receiver asserted an interest in some as-yet unquantified  
3 portion of those funds.

4 On the petition date this Court obtained exclusive  
5 jurisdiction over all funds in debtor's general bank account,  
6 under Section 1334(e) of Title 28, accord *In re Simon*, 153 F.3d  
7 991 at 996, Ninth Circuit 1998.

8 Now the receiver argues at length that this Court is  
9 purporting to decide whether the \$1.7 million in commingled  
10 funds constitutes property of debtor's bankruptcy estate, it is  
11 correct that this Court is of the opinion that as of the filing  
12 of the bankruptcy petition this Court obtained exclusive  
13 jurisdiction to determine what is or is not property of the  
14 estate.

15 However, it is not necessary for this Court to decide  
16 one way or the other whether the 1.7 million is property of the  
17 debtor's estate in order to issue a preliminary injunction  
18 against enforcement of the contempt proceeding against debtor  
19 and the omnibus order, in particular, vis-a-vis the distribution  
20 of any such funds. Rather, this Court need only find that there  
21 are serious questions going to the merits, of whether the 1.7  
22 million in commingled funds is property of the debtor's estate.

23 The irreparable harm to debtor of having to turn over  
24 those funds to the receiver, who could then dissipate them, is  
25 so great that this Court need only find that there are serious

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1 questions going to the merits on that issue. In granting debtor  
2 a preliminary injunction, this Court is not reviewing the  
3 decision of the Florida Court. Instead, this Court is deciding  
4 debtor's likelihood of success on the merits and, alternatively,  
5 that there are serious questions going to the merits in the  
6 context of ruling on debtor's request for a preliminary  
7 injunction.

8 In evaluating debtor's likelihood of success on the  
9 merits, this Court also needs to consider the circumstances  
10 under which the Florida Court entered the omnibus and  
11 clarification orders. The bankruptcy estate did not exist at  
12 the time the omnibus order was entered. The bankruptcy estate  
13 was not given any opportunity to brief or argue the merits of  
14 the FTC's emergency motion prior to the Florida Court issuing  
15 the, quote, clarification order, unquote, postpetition.

16 In the clarification order, the Florida Court  
17 purported to determine what interest the bankruptcy estate had  
18 in the approximately \$1.7 million ordered to be turned over to  
19 the receiver in the omnibus order, although there's no  
20 quantification in the omnibus order whatsoever, without the  
21 bankruptcy estate having the opportunity to argue or brief that  
22 issue in any way.

23 This is an additional significant reason debtor is  
24 likely to prevail on the merits. Alternatively, debtor  
25 certainly has demonstrated a substantial question going to the

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1 merits of the procedure underlying the issues of the  
2 clarification order.

3 In issuing this preliminary injunction, this Court is  
4 not issuing an order that is in conflict with any issue that is  
5 presently before the Eleventh Circuit. Indeed the parties, that  
6 is debtor, receiver, and the FTC, have all agreed to pursue the  
7 litigation before the Eleventh Circuit and nothing in this  
8 Court's preliminary injunction precludes the parties from doing  
9 so. Plus, debtor's bankruptcy case is moving very rapidly. By  
10 December 7th or before, the parties and this Court may know much  
11 more about what debtor's reorganization plans will be and  
12 whether the debtor even needs the \$1.7 million that are – that  
13 are in dispute.

14 Thus the parties and this Court may also have  
15 additional information regarding the status of the appeals in  
16 the Eleventh Circuit and the FTC's appeal of this Court's  
17 Memorandum Decision.

18 The debtor will be seriously and irreparably harmed if  
19 the receiver and FTC are permitted to enforce the omnibus order  
20 and to possibly dissipate the \$1.7 million. First, they're  
21 already being harmed by – if the FTC or the receiver are able to  
22 force the debtor to transfer funds out of the debtor's estate,  
23 and debtor certainly has possession of those funds, and preclude  
24 the possibility the debtor will be able to use them in the  
25 context of debtor's reorganization.



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1           This Court is not enjoining that, but I do find that  
2           the debtor will be seriously harmed if that occurs. But even if  
3           the funds are transferred, the debtor would be very  
4           substantially and irreparably harmed as well if the receiver has  
5           the right to dissipate those funds, particularly at this point  
6           in debtor's reorganization efforts.

7           If the funds are dissipated the debtor's estate will  
8           lose the over \$1.7 million that appears very likely to be  
9           property of this estate. Those funds will not be available to  
10          debtor or secured or unsecured or other creditors if they are  
11          turned over to the receiver and then dissipated.

12          Moreover, if the debtor is required to turn over the  
13          commingled funds, the debtor will be preferring receiver over  
14          all similarly-situated creditors. Debtor is a debtor-in-  
15          possession is a fiduciary to all of debtor's creditors, *inter*  
16          *alia*, secured creditors, unsecured creditors, customers, the –  
17          excuse me – the FTC, and the receiver.

18          The receiver certainly does not represent all  
19          creditors of debtor's estate. At most, receiver represents the  
20          receivership estates of the prior customers and the FTC.  
21          Receiver does not seek to have the commingled funds turned over  
22          to him to protect those funds for all creditors of debtor's  
23          bankruptcy estate. Rather, receiver seeks possession of those  
24          funds for the benefit of the receivership estates of the prior  
25          customers to the exclusion of debtor's other secured and

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1 unsecured creditors.

2           Permitting receiver to implement the omnibus order  
3 would irreparably harm the debtor's bankruptcy estate by  
4 preferring one creditor, the receiver, over similarly-situated  
5 creditors of the debtor since most if not all service contracts  
6 provide for the same reserves. And I put the term "reserves" in  
7 quotes.

8           Additionally, as set forth in great detail in the  
9 Memorandum Decision at pages 29 to 35, this is a critical time  
10 in debtor's reorganization. Permitting the receiver to continue  
11 his enforcement of the omnibus order and possibly dissipate the  
12 funds would terribly divert the debtor's president and other  
13 personnel from the critical reorganized efforts. The debtor  
14 continues actively to pursue a successful organization and is  
15 working closely with the Creditors' Committee toward that end.  
16 Diverting debtor's management at this critical juncture with  
17 time and attention that would be devoted to addressing the  
18 enforcement of the omnibus order would threaten debtor's  
19 reorganization.

20           Finally, in addition to the diversion of debtor's  
21 management from the reorganization process, debtor will be  
22 harmed by incurring substantial legal fees and costs the debtor  
23 could ill afford at this juncture if enforcement of the omnibus  
24 order is not enjoined, at least in terms of any possible  
25 distribution of such funds.

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1 Debtor estimates that the debtor will incur an  
2 additional 50,- to \$150,000 in fees related to the receiver's  
3 request for the turnover of commingled funds. Receiver argues  
4 that the contempt proceedings are largely complete and the  
5 orders are self-executing. However, the omnibus order is now on  
6 appeal. If the enforcement of the omnibus order is not  
7 enjoined, the debtor will have to comply with the order to turn  
8 over the funds or show cause why the debtor should not be held  
9 in contempt and then deal with any subsequent appeals of the  
10 Florida Court's decision.

11 Now this Court, as I say, is limiting its injunction.  
12 Although I think that the debtor will be harmed by all of those  
13 things, because of comity I am limiting my decision to  
14 prohibiting the receiver and the FTC from dissipating any funds  
15 that are turned over to them that are presently in the debtor's  
16 estate.

17 As set forth in greater detail in the Memorandum  
18 Decision at pages 49 to 52, receiver asserts that enjoining the  
19 contempt proceeding will harm the receiver by interfering with the  
20 administration of a receivership, relitigating the parties'  
21 disputes that have already been addressed by the Florida Court  
22 in the omnibus and clarification orders, and the dissipation of  
23 1.7 - \$1,762,762.56 that the Florida Court required debtor to  
24 turn over to the receiver. This Court has already addressed why  
25 enjoining the receiver does not unduly interfere with the

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1 administration of the Florida Court receivership and why the  
2 preliminary injunction is not a relitigation of the omnibus and  
3 clarification orders.

4 The alleged harm to the receiver of not being able to  
5 dissipate the funds does not outweigh the enormous threat of  
6 irreparable injury to the debtor should the Court not issue a  
7 preliminary injunction.

8 As I say, the Court has found that the debtor has  
9 demonstrated a likelihood of success on the merits, but that the  
10 Court need only find in this context that there are serious  
11 questions going to the merits because the debtor has made such a  
12 strong showing of a likelihood of irreparable injury if this  
13 preliminary injunction would not issue.

14 Alternatively, this Court finds the debtor has made a  
15 very strong showing of irreparable injury and debtor has  
16 demonstrated without a question that there are serious questions  
17 going to the merits.

18 Thus, based on the facts of this case in consideration  
19 of the relative hardship of the parties and the public interest  
20 concerns, the Court finds that continued enforcement of the  
21 omnibus order severely threatens the integrity of the bankruptcy  
22 process and debtor's prospects for reorganization and a  
23 preliminary injunction of continued enforcement of the omnibus  
24 order against debtor through March 14 is warranted – at least  
25 insofar as enjoining the receiver's ability to do anything but

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1 hold any funds that are now in the debtor's estate in an  
2 interest-bearing account, if the receiver gets possession of  
3 them.

4 On March 7, 2008 at 1:00 p.m. the Court will hold a  
5 further hearing on whether the preliminary injunction of the  
6 continued enforcement of the omnibus order should be continued  
7 beyond March 14, 2008. Any party may request that the  
8 preliminary injunction be modified or listed – I'm sorry – or  
9 lifted before March 7, 2008 for good cause shown based on facts  
10 that are not currently before the Court.

11 So, as a matter of comity, I am not issuing the  
12 injunction to block the receiver from seeking to have possession  
13 of the funds turned over to him. I certainly think that the  
14 debtor has made a case for a preliminary injunction on that  
15 regard; but, as a matter of comity, I am not issuing that  
16 injunction.

17 The District Court has ordered the debtor to turn  
18 funds over to the receiver and my order today does not stop  
19 that. My order says, though, that if they are turned over to  
20 the receiver, that the receiver or the FTC, or anyone else,  
21 cannot do anything but keep them in a blocked, interest-bearing  
22 account absent further order from this Court. And the debtor  
23 should prepare a form of order after review by the FTC and the  
24 receiver.

25 Are there any questions?

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1 MR. OETZELL: Yes, Your Honor. I'm sorry. This is  
2 Walter Oetzell. I'm sorry. Your injunction means that the  
3 receiver can go to the District Court in an attempt to get the  
4 funds turned over, even though that would constitute the  
5 enforcement of the contempt order, correct?

6 THE COURT: My injunction does not enjoin that.

7 MR. OETZELL: Right.

8 THE COURT: That may be a violation of the stay, and I  
9 caution you that; -

10 MR. OETZELL: I understand.

11 THE COURT: - but this injunction today does not block  
12 that.

13 MR. SACKS: Your Honor, this -

14 THE COURT: So I'm not saying you may. I'm just  
15 saying that the injunction that I've issued today does not block  
16 that action.

17 MR. SACKS: Your Honor, Steven Sacks. It seems to me  
18 it's correct that the Court has ruled that the Barton doctrine  
19 prohibits the receiver from taking action in the Florida Court  
20 without the permission of the Bankruptcy Court.

21 THE COURT: That wasn't sought. You never sought that  
22 relief. It was just an argument that you put in that I agreed  
23 with. That if the Barton doctrine is applicable, that the  
24 Barton doctrine is applicable both ways.

25 MR. SACKS: But -

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1           THE COURT: That's all that happened. You didn't come  
2 in here seeking an injunction based on the application of the  
3 Barton doctrine. In fact, you said that the Barton doctrine  
4 didn't apply. And I say if the Barton doctrine applies it would  
5 apply to this Court. That's all that's happened, Mr. Sacks.

6           MR. SACKS: Well, Your Honor, normally one doesn't  
7 seek an injunction based on the Barton doctrine, but it still  
8 applies. And the Court's holding -

9           THE COURT: I don't know what you just said, but I've  
10 tried to make myself clear.

11          MR. SACKS: Your Honor, the further relief we would  
12 request is that the Court hold a hearing on or about Friday,  
13 November 30th, to consider our motion to amend the complaint and  
14 that the Court further consider issuing an order shortening time  
15 hearing on a motion for summary judgment with respect.

16          THE COURT: Do we have other hearings on November 30?  
17 Why are you picking that day?

18          MR. SACKS: Because it's quite soon.

19          MR. FIERO: Your Honor, it's the date of the continued  
20 cash collateral -

21          THE COURT: I can't hear. Whoever's talking, I can't  
22 hear you.

23          MR. FIERO: I'm sorry, Your Honor. It's John Fiero.  
24 It's the date of the continued cash collateral hearing.

25          THE COURT: Oh, I see.

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1 Well, what's the FTC and the receiver's position?

2 MR. MORA: Your Honor, Michael Mora for the  
3 Commission. I think we've stated our position previously.

4 THE COURT: I'm talking about the timing, Mr. Mora.  
5 It's not — I'm not talking about the merits. I'm just talking  
6 about —

7 MR. MORA: Your Honor, we — we would like to see a  
8 motion from them to amend their complaint and have sufficient  
9 time to respond because, again, —

10 THE COURT: Okay. When will they see the motion, Mr.  
11 Sacks?

12 MR. SACKS: We can file a motion by tomorrow, Your  
13 Honor.

14 THE COURT: Then why do I need to do this on two days'  
15 notice?

16 MR. SACKS: Because, Your Honor, I think the sooner  
17 that we have a final ruling with respect to what is and what  
18 isn't property of the estate with regard to the funds, —

19 THE COURT: Mr. Sacks, you're not talking directly and  
20 distinctly into the phone.

21 MR. SACKS: I'm sorry, Your Honor. I think it's  
22 important to the Court's jurisdiction that it act immediately to  
23 issue a final ruling that is not just based on probability of  
24 success on the merits, but in fact is a ruling with respect to  
25 its jurisdiction over property of the estate. And so we would



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1 like to get to that ruling as soon as reasonably possible,  
2 particularly –

3 THE COURT: And how would allowing you to amend your  
4 complaint give you a final ruling on that?

5 MR. SACKS: Well, it doesn't, Your Honor. But it's an  
6 interim step towards filing a motion that would resolve that  
7 issue and ultimately would produce a finally dispositive ruling  
8 with respect to that issue from the Bankruptcy Court.

9 THE COURT: And how is this briefing going to – how do  
10 you propose this briefing is going to occur?

11 MR. SACKS: Well, Your Honor, I can't imagine how they  
12 reasonably could have opposition to a motion to amend the  
13 complaint at this early stage, but I have no objection to them  
14 filing a opposition brief, if they so choose.

15 THE COURT: When, Mr. Sacks?

16 MR. SACKS: Well, Your Honor, it's probably more for  
17 the convenience of the Court. We can give them a motion by noon  
18 tomorrow. And if they can file a response two days later,  
19 that's certainly all right with me. But if –

20 THE COURT: But then you don't get a reply and I don't  
21 get to read it.

22 MR. SACKS: Well, obviously you should get to read it.  
23 So I don't need a reply. We can argue it.

24 THE COURT: All right. We'll go off the record.  
25 We'll take a five-minute recess.

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1 Do you want to respond to that, Mr. Mora, or Mr.  
2 Oetzell?

3 MR. OETZELL: I just don't see what a couple weeks is  
4 going to hurt the debtor in respect of filing the motion to  
5 amend and giving everybody a chance to take a look at it.

6 THE COURT: Okay. There's -

7 MR. OETZELL: I understand Mr. Sacks has been talking  
8 about a summary judgment, but, you know, let's get serious.  
9 This is an evidentiary -

10 THE COURT: I can't hear you, Mr. Oetzell, because  
11 you're - you're not talking directly into the phone and -

12 MR. OETZELL: I'm sorry. I said I - I do not see  
13 what a couple of weeks is really going to matter for the debtor  
14 in respective of getting this - this motion before the Court. I  
15 know Mr. Sacks has been talking about summary judgment and  
16 almost immediate ruling. But, let's face it, this is an  
17 adversary proceeding and a trial. That's not going to happen  
18 right away.

19 MR. FIERO: Your Honor, this is John Fiero. How could  
20 that possibly be? They've already gotten essentially the mirror  
21 image relief without any hearing of any kind. Certainly this  
22 Court could on a summary judgment basis issue a ruling which  
23 would support a finding that this is property of the estate.

24 THE COURT: I don't understand, Mr. Fiero, it's  
25 certainly in the possession of the estate. But whether it

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1 ultimately will be property of the estate, are you saying I  
2 could make a decision more than the debtor has possession of it,  
3 on shortened time on summary judgment?

4           There's no question the debtor has possession of it  
5 now, although by ten days from now the debtor may not have  
6 possession of it. So what are you thinking that I can do on  
7 summary judgment?

8           MR. FIERO: Well, Your Honor, I think the first  
9 question is simply whether or not the debtor should be allowed  
10 to amend its complaint. Had the FTC not filed a motion to  
11 dismiss, it could be done as of right -

12           THE COURT: That's right.

13           MR. FIERO: Everyone knows what the claim is going to  
14 be and I believe that the debtor has actually circulated an  
15 amended complaint which reflects the changes. So there is no  
16 sandbagging of any adverse party here.

17           With regard to summary judgment, Your Honor, I think  
18 you could find that any moneys held by the debtor on the date of  
19 bankruptcy which were the subject of commingling were, in fact,  
20 property of the estate.

21           THE COURT: I see. Okay. We will take a five-minute  
22 recess. Thank you, ladies and gentlemen.

23           THE CLERK: Please rise.

24           (Recess taken from 3:35 p.m. to 3:53 p.m.)

25           THE CLERK: Please rise.

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1 THE COURT: Please be seated.

2 Counsel, - Mr. Sacks, I have to tell you I'm a little  
3 uncertain as to what your position is and let me see if I can  
4 lay it out for you.

5 Ms. Diemer is very concerned, Mr. Fiero is very  
6 concerned about letting the money out of this Court's  
7 jurisdiction. And I understand that concern. But I can't  
8 conceive under the circumstances here of allowing the debtor to  
9 use those funds, given the pendency of the Eleventh Circuit  
10 action.

11 So as long as you want the option to come here and ask  
12 me to release those funds, then holding these funds in a blocked  
13 account here may hurt you, because I don't think I'm going to do  
14 that. So if I abstain, then you can make whatever arguments you  
15 want outside of this Court.

16 MR. SACKS: This is Steven Sacks. Your Honor is going  
17 to a different question than I think we raised. We want to get  
18 a ruling from this Court on a matter -

19 THE COURT: No, no. I'm not. I understand you want a  
20 briefing on the summary judgment and the property-of-the-estate  
21 issue, which is problematic in terms of timing for a different  
22 reason. But that - we can talk about that, but I'm saying I'm  
23 still considering the possibility of doing what Ms. Diemer and  
24 Mr. Fiero want, and that is keeping the funds here. But not if  
25 what you're going to want me to do is release them to the

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1 debtor; I don't see myself doing that. So...

2 MR. SACKS: Your Honor is addressing a question that's  
3 not before the Court with respect to whether the funds would be  
4 released, which at present we would need to file papers with you  
5 tomorrow seeking a hearing on December 7th with respect to  
6 release on December 14th.

7 THE COURT: Right. But the receiver said that if  
8 you'd agree to keep the funds until the Eleventh Circuit rules,  
9 and without prejudice to whatever you do with respect to filing  
10 your adversary here, at least the receiver would not have  
11 opposed an order blocking distribution of the funds. The FTC  
12 would, but you said no to that. And that no means that you want  
13 the ability before the Eleventh Circuit rules to come here and  
14 ask me to release the funds.

15 MR. SACKS: Well, Your Honor has... We may want that  
16 ability, Your Honor. We're not asking for it today. What we  
17 asked for today that was denied was with respect to whether we  
18 were subject to contempt proceedings in the Southern District of  
19 Florida, and I -

20 THE COURT: And the receiver said -

21 MR. SACKS: - I admit that's a substantially  
22 different -

23 THE COURT: And the receiver said if you agree not to  
24 - not to dissipate the funds until the Eleventh Circuit rules,  
25 he's not going to do that.

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1 MR. SACKS: And it seems to me that that is still  
2 potentially on the table then, though –

3 THE COURT: It is.

4 MR. SACKS: But though does – the FTC didn't agree, so  
5 conceivably they could –

6 THE COURT: I would have to enjoin the FTC but not the  
7 receiver.

8 MR. SACKS: If –

9 THE COURT: I'm not asking you to agree to something  
10 you don't want to agree to, Mr. Sacks. I'm just trying to lay  
11 it out for you.

12 My concern, the thing that troubles me is that if I  
13 grant – if I issue an order keeping the funds here with the  
14 intention internally, if you will, I mean it's advisory to a  
15 certain extent I guess, but it's also the concern about whether  
16 I should abstain, whether – whether I should keep them here if I  
17 don't intend to release them.

18 MR. SACKS: Your Honor, I submit that there are two  
19 different questions. One is whether you should release the  
20 funds and one is whether the Court has exclusive jurisdiction  
21 over property of the estate and that the funds in the debtor's  
22 account as of the petition date were property of the estate and  
23 the Court could adjudicate that without regard to whether it's  
24 holding the funds or not.

25 THE COURT: Yes. But I'm not concerned about that at

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1 this point, the second. The second we can put on a schedule and  
2 you can – you can put up before me, the issue as to whether  
3 they're funds properly in the estate – whether they're estate  
4 funds or not estate funds.

5 But my concern is that you're talking about wanting  
6 potentially a hearing on December 14th where you're going to ask  
7 me to release the funds and come in with some emergency  
8 situation for the debtor. And if that's on the table, even if  
9 it's not December 14th, then I'm very concerned about that.

10 MR. SACKS: Well, Your Honor, I'm concerned as well.  
11 I think our position at this point, which is subject to change  
12 because things have changed in terms of what we expected from  
13 the Court today, but I think our position is that we don't need  
14 the funds as of December 14th and that we were serious when we  
15 said to the Court last week that we were willing to have them  
16 remain in the account that they're in subject to a motion to  
17 release them on notice when we do need them. But I do think  
18 that we are going to need them long before we get a ruling from  
19 the Eleventh Circuit, which could be a year from now, two years  
20 from now, we don't know.

21 And the reason the debtor filed for bankruptcy was  
22 not, as the FTC suggests, to avoid its enforcement proceeding,  
23 but because we needed the money that was otherwise going to have  
24 to be paid to the receiver. And so the point of this bankruptcy  
25 was to preserve that money for all creditors, not to have it

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1 held indefinitely or paid to the receiver. And so we may be  
2 faced with the necessity to ask the appropriate court, which  
3 we've always thought was this one, to let us use the funds in  
4 our bank account to preserve the estate.

5 THE COURT: Okay. Does anybody else want to say  
6 anything? There are some papers in another room I need to get.

7 Okay. We'll be in a recess for a couple minutes. go  
8 off the record. Don't rise, please.

9 (Recess taken from 4:01 p.m. to 4:05 p.m.)

10 THE CLERK: Please rise.

11 THE COURT: I have a question for the FTC.

12 MR. MORA: Yes, Your Honor. Michael Mora here.

13 THE COURT: As you can see, this is a very difficult  
14 issue and we're struggling with it because I sincerely believe  
15 that these are likely property of the estate, these funds.

16 If I require by order the debtor to keep the funds  
17 here in a blocked account and don't specifically enjoin your  
18 contempt proceeding, do you have any basis to go after the  
19 debtor for contempt?

20 In other words, do I have to enjoin you in order – in  
21 order for you to leave the funds in the blocked account here?

22 MR. MORA: I'm sorry, Your Honor. I'm not sure I  
23 follow.

24 THE COURT: Well, let's say I issue an order ordering  
25 the debtor to maintain the funds in a blocked account here and I



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1 don't specifically enjoin anything in Florida? Do you have a  
2 basis to pursue contempt, given that the debtor is merely  
3 following the order of this Court?

4 MR. MORA: Well, Your Honor, the – I think the only  
5 way I can answer that is the basis for the civil contempt action  
6 before the Florida District Court is Integretel's failure to  
7 turn over funds that they were originally required to turn over,  
8 you know, almost a year and a half ago now. So that contempt  
9 would still exist.

10 THE COURT: What do you mean it would still – you mean  
11 the historical contempt would still exist, but the future  
12 contempt prospectively, they'd be under an order from this Court  
13 not to transfer the funds.

14 MR. MORA: Well, the contempt is their original and  
15 ongoing failure to turn over the money as required by the  
16 District Court's order.

17 THE COURT: Yeah. But you haven't addressed my  
18 question. My question is if I enjoin them from transferring the  
19 funds anywhere, then what?

20 MR. SINGER: Your Honor, this is John Singer from the  
21 Federal Trade Commission. I'm not a hundred percent certain,  
22 but I know that generally civil contempt, as I understand it, is  
23 usually prospective.

24 THE COURT: Mr. Singer, I'm sorry. I – I understood  
25 part of what you said, but not the rest. If you could – are you

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1 on some kind of a speaker –

2 MR. SINGER: I'll –

3 THE COURT: Are you on a speaker?

4 MR. SINGER: I'll start over again, Your Honor, and  
5 try to speak up. I think I faded out. I apologize. My voice  
6 faded.

7 Your Honor, the point which I'm simply saying is this:  
8 I think – I think if we – if anyone were to move for contempt  
9 against Integretel at this point to compel them to pay the \$1.7  
10 million over to the receiver, and Your Honor had entered an  
11 order that said: You cannot – Integretel, that money has to  
12 stay here under – has to stay here in California, I would  
13 presume if I were in Integretel's shoes, I would say: Your  
14 Honor, Judge Ryskamp in Florida, it's impossible for us out  
15 comply with any contempt order because Judge Weissbrodt in  
16 California has said we can't transfer the funds to you, –

17 THE COURT: Right.

18 MR. SINGER: – even if you wanted to.

19 THE COURT: Right.

20 MR. SINGER: And I think – I think your order keeping  
21 it in California would essentially negate your order permitting  
22 us to go forward with the contempt proceeding. I think it's an  
23 either or attachment –

24 THE COURT: It would negate? Wait, Mr. Singer, here's  
25 the question. If I issue an order requiring the debtor to keep

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1 the funds here, is it your position that you would still have  
2 the right to seek contempt against the debtor?

3 Because if you say to me that you agree with me or  
4 that you agree that you wouldn't have the right to seek contempt  
5 if I order the funds here, until my order is reversed, if it is,  
6 if it's overturned then, you know, that's a different story, but  
7 as long as my order were in effect, that I don't have to  
8 specifically enjoin you from doing anything. I can merely order  
9 the debtor to keep the funds here based on the debtor's request  
10 for a preliminary injunction. If I can do that and not enjoin  
11 you, I would prefer to do that.

12 MR. SINGER: Your Honor, I – I – I'm not sure of the  
13 answer to that, Your Honor, because, as I said, I think they – I  
14 think, and I don't claim expertise in this whole area, the  
15 receiver may have a comment as well since he brought the motion,  
16 but I would have concerns as to whether there would be an  
17 impossibility defense.

18 THE COURT: Right.

19 MR. SINGER: Having said that, –

20 THE COURT: And so – but the receiver is easier is  
21 because the receiver has said if I block the funds the receiver  
22 isn't going to oppose keeping the funds here. But you're a  
23 little more difficult, and so the question is if I block the  
24 funds are you then going to go after the debtor for contempt.  
25 If you say no, then – then that would be helpful. Then I don't

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1 have to enjoin you.

2 MR. SINGER: Your Honor, I don't know that we - I  
3 don't - I would have to speak to the receiver about that, but I  
4 think the answer may be we may seek contempt, but they may have  
5 a defense. And that would be something that Judge Ryskamp would  
6 have to determine. So, no, I can't - I cannot assure Your Honor  
7 that unless you - that if you don't enjoin us to keep the funds  
8 in California, we would not seek - we would not seek a contempt  
9 finding against Integretel in the Florida District Court.

10 MR. GOLDFARB: Your Honor, Neal Goldfarb. If I could  
11 just say one thing -

12 THE COURT: Yes. But, Mr. Goldfarb, you need to speak  
13 much more loudly and much more directly into your phone.

14 MR. GOLDFARB: I'm sorry. Is that better?

15 THE COURT: Yes.

16 MR. GOLDFARB: Yes. Just - I wanted to just point out  
17 one thing that happened in the Florida litigation when we moved  
18 before Judge Ryskamp for a stay pending appeal, the motion was  
19 what Judge Ryskamp, quote, conditionally granted, the condition  
20 being that we pay the money to the receiver but then the  
21 receiver hold it in a segregated account pending the Eleventh  
22 Circuit's decision. So that's - I just wanted to make the Court  
23 aware. I don't know if the Court's aware of that aspect of the  
24 procedural history, that the Court, you know, apparently was  
25 willing to stay, you know, other enforcement efforts and other

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1 contempt proceedings, apparently, if the funds were – were held  
2 by the receiver, you know, pending the decision.

3 THE COURT: All right. Okay.

4 MR. SINGER: Your Honor?

5 THE COURT: Yes.

6 MR. SINGER: I would simply like to say that actually  
7 the order was essential on September 14th to pay the \$1.7  
8 million to the receiver or be held in contempt. And that is  
9 correct – what Mr. Goldfarb says is correct but not especially  
10 remarkable, because essentially by paying the money to the  
11 receiver to be held by the receiver is what – was a choice:  
12 Contempt or pay the money over. I'm not quite sure what – I'm  
13 not sure Mr. Goldfarb made a particularly remarkable point  
14 there, but if Your Honor feels differently, that's your –

15 THE COURT: I don't understand what you just said.

16 MR. SINGER: Okay. Well, –

17 THE COURT: You sort of went round and about with  
18 that, and I don't understand what you just said.

19 MR. SINGER: I apologize, Your Honor.

20 THE COURT: Can you explain what you just said?

21 MR. SINGER: I'll try. What I'm saying is, Your  
22 Honor, that that was the – that's exactly what the September  
23 14th order was, was pay the money to the receiver or – within  
24 ten days – or say why you shouldn't be held in contempt. I  
25 don't think that – that's what contempt – what a show-cause

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1 order is. And I'm not quite sure what point Mr. Goldfarb was  
2 making.

3 MR. GOLDFARB: I'm also not sure that's exactly what  
4 the Court said, meant by the show-cause order. It's not – it's  
5 not that clear to me.

6 THE COURT'S RULING, FURTHER

7 THE COURT: Okay. All right. Ladies and gentlemen,  
8 I'm not going to let the funds out of California. The debtor is  
9 enjoined from, based on all the findings of fact and conclusions  
10 of law, which may make sense for me to repeat, the debtor is  
11 enjoined from letting the funds out of California. He has to  
12 keep them in a blocked – the debtor has to keep them in a  
13 blocked, interest-bearing account. If they're not in an  
14 interest-bearing account they should be moved to an interest-  
15 bearing account.

16 The – and the receiver, I guess, under the  
17 circumstances has to be enjoined from proceeding with the  
18 contempt proceedings because the receiver wants to take action  
19 which would force the debtor to transfer the funds, which this  
20 Court is ordering to be retained. And so I'm not limiting the  
21 findings of fact and conclusions of law to distribution by the  
22 receiver. I'm enjoining the debtor from – I'm enjoining the  
23 receiver from pursuing the contempt proceedings and I'm  
24 directing the debtor to maintain the funds in the blocked  
25 account.

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1 MR. OETZELL: Your Honor, are they to remain there  
2 until the Eleventh Circuit rules?

3 THE COURT: They're to remain there pending further  
4 order of the Court.

5 MR. OETZELL: Your Honor, -

6 MR. SACKS: Your Honor, this is Steven Sacks. Are you  
7 enjoining both the receiver and the FTC from proceeding with  
8 contempt -

9 THE COURT: Yes, both. Both.

10 MR. OETZELL: Your Honor, -

11 THE COURT: Is this Mr. Oetzell?

12 MR. OETZELL: Yes. Yes. Does this - is this the  
13 broad language that we had in the TRO including suggesting, et  
14 cetera? Because this -

15 THE COURT: Yes.

16 MR. OETZELL: - this makes it quite impossible for us  
17 to operate as a receiver and fulfill our duties as receiver - as  
18 the Court has -

19 THE COURT: Well, in terms of the terms of the order,  
20 Mr. Oetzell, you'll have to - we'll have to have a separate  
21 hearing on that. I'm not capable of reconstructing what  
22 arguments make sense in the context of a preliminary injunction.  
23 You'll have - we'll work with that on the order.

24 The answer is that the order has to be such that -  
25 that you're - that you're enjoined. And - and I don't see any

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1 reason why we wouldn't go back to the TRO order, which I  
2 adjudicated with you present and – when I say "present," on the  
3 phone, and the counsel for the debtor present. I went through  
4 the two orders and made decisions. If – if things have changed  
5 in the context of a preliminary injunction and you want to argue  
6 that in the context of the order, that's fine. But the order  
7 goes into effect immediately, meaning today, even though we're  
8 going to go through the ministerial task of preparing a written  
9 order and – in order for me to give you an opportunity, if you  
10 want that, to discuss it.

11 I'm concerned, Mr. Oetzell, that you'll see a window,  
12 and I don't mean this in any way critically of you, but you'll  
13 see a window, there won't be a written order and therefore you  
14 can go do something. If you tell me that you understand that  
15 the order is effective immediately, then if it takes us a day or  
16 two to work out the language, I'm willing to do that.

17 MR. OETZELL: We understand that, Your Honor.  
18 However, we need some assurance, particularly in respect of Mr.  
19 Sacks' comments just a few minutes ago that that money is in  
20 danger of being dissipated.

21 It was made clear in his comments beyond argument that  
22 they intend to come in here and attempt to spend that money.  
23 That's exactly what we have been fighting about.

24 THE COURT: Well, but, Mr. Oetzell, I tried to work  
25 this out consensually. And I'm not – I don't know whether the



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1 Eleventh Circuit's going to take two years to rule. I – I  
2 wanted to work this out consensually with you and the FTC,  
3 giving you a very strong window of time before anything could  
4 happen. But the FTC said absolutely no. The FTC wants a  
5 decision. Here's the decision. If I could – if I could have  
6 worked something out consensually with you, Mr. Oetzell, I would  
7 have done that, as you can well tell from my behavior in this  
8 context.

9 MR. OETZELL: I understand, Your Honor. But I of all  
10 people in this courtroom have been cooperative throughout –

11 THE COURT: But you –

12 MR. OETZELL: – this – this situation. You had a very  
13 – a solution with this thing prior, and now we are being put in  
14 the position where we had said we would not object to is not  
15 happening.

16 THE COURT: I understand, but you –

17 MR. OETZELL: The money is now subject –

18 THE COURT: But the FTC says they're the real  
19 party-in-interest and they don't agree to anything. So, Mr.  
20 Oetzell, I have no criticism of you as a lawyer. You're welcome  
21 in my Court any time. I understand what you want. And you'll  
22 just have to trust the situation to the extent you want to. But  
23 there's going to be appeal – an appeal anyway today – or I don't  
24 mean the appeal's going to come today. But I mean there's going  
25 to be an appeal of my order today; the FTC has made that

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1 perfectly clear. Even if I had limited the order, the FTC made  
2 it perfectly clear that they would appeal. So -

3 MR. OETZELL: Well, enjoin the FTC.

4 THE COURT: Well, -

5 MR. OETZELL: And let us go into the Florida Court  
6 and, as - as Your Honor -

7 THE COURT: But the FTC says that you're not the real  
8 party-in-interest, that they're the real party-in-interest in  
9 your suit. I mean that's - that's what the FTC's position is,  
10 Mr. Oetzell.

11 And so as - and I agree with you, that your positions  
12 have been more cooperative in trying to work something out than  
13 the FTC's. I don't mean that by criticizing the FTC. I'm not  
14 criticizing the FTC. They've taken a harder line. They're less  
15 willing to try to work something out. And so there it is.

16 MR. OETZELL: Okay. Your Honor, I - I will have to  
17 ask for a stay of - of the injunction.

18 THE COURT: I understand and the stay is denied,  
19 otherwise it would defeat the purpose of the injunction.

20 MR. MORA: And we join that request, Your Honor.

21 THE COURT: And I understand, Mr. Mora, and the stay  
22 is denied, otherwise it would defeat the purpose of the  
23 injunction.

24 MR. OETZELL: Your Honor, -

25 THE COURT: Now, Mr. Mora, the one thing I need from

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1 you, so – I would just – Mr. Oetzell wants to talk to me about  
2 the form of the order. But I want you to agree that the order  
3 is effective immediately so that I have time to work out  
4 language with the parties. If you don't, then perhaps the  
5 solution would be to issue a preliminary injunction in the exact  
6 form as the TRO so at least I have a written order in effect  
7 immediately.

8 MR. MORA: And we – we would much prefer the latter,  
9 Your Honor, because we need to – we need to preserve our appeal  
10 rights as well.

11 THE COURT: I don't know why you wouldn't preserve  
12 your appeal right if we got an order out in two days. You would  
13 prefer that I issue a PI in the form of the TRO?

14 MR. MORA: Yes, Your Honor.

15 THE COURT: All right. So, Mr. – and so that's  
16 inconsistent with what the receiver requests, but given that  
17 that's what you want, then, Mr. Sacks, you should fax me  
18 immediately the PI, having said that I issued my findings of  
19 fact and conclusions of law, including the decisions today.

20 MR. SACKS: This is Steven Sacks. I can do that, Your  
21 Honor.

22 THE COURT: As well as the hearings on the 16th and  
23 the 19th.

24 Now let me tell you that I would have preferred  
25 another route to this if we possibly could have agreed to it.

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1 And – but we obviously haven't been able to, so that's the  
2 situation.

3 So you fax me a preliminary injunction today, Mr.  
4 Sacks, in the next few minutes, and I'll issue it.

5 MR. OETZELL: Your Honor, what are we going to do  
6 about the December 7th hearing in respect of these – of these  
7 funds? This is going to be off calendar.

8 THE COURT: Well, I assume that the debtor has told me  
9 – the debtor has told me it doesn't need the December 7th  
10 hearing, so we don't need a December 7th hearing.

11 Is that right, Mr. Sacks?

12 MR. SACKS: Steven Sacks speaking. That's correct,  
13 Your Honor. I do still want to proceed with amending the  
14 complaint, however.

15 THE COURT: All right. Hold on a second. I have to  
16 consult about scheduling.

17 (Pause in the proceedings.)

18 THE COURT: I was just corrected. The comments that I  
19 made that I'm incorporating are on the 16th and the 21st, not on  
20 the 19th. I apologize.

21 Now, Mr. Sacks, under the circumstances I don't really  
22 see the emergency. Why don't you use the December 7th time to  
23 argue this amending-the-complaint business and why don't you set  
24 it for summary judgment in January?

25 MR. SACKS: Steven Sacks speaking. December 7th would

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1 be fine for amending the complaint, Your Honor, and we can  
2 figure out a time from there for further proceedings.

3 THE COURT: Fine. I have –

4 MR. MORA: But, Your Honor, we don't – the FTC does  
5 not consent to a motion to amend the complaint, though.

6 THE COURT: I understand.

7 MR. OETZELL: And also, Your Honor, as far as the  
8 summary judgment motion goes, we expect full discovery,  
9 particularly since they've raised this issue of tracing.

10 THE COURT: Right. I'm not going to set it now.  
11 We'll talk about it on the 7th.

12 MR. OETZELL: All right.

13 THE COURT: I would request that the parties get  
14 together and file a joint status conference sheet by December 5,  
15 telling me what your respective positions are regarding  
16 scheduling of the summary judgment. And to the extent you can  
17 agree, great; to the extent you can't agree, lay it all out, so  
18 when I come in on the 7th I'm fully prepared. I'd actually like  
19 it by the 5th at noon.

20 Okay. And with respect to – so with respect to  
21 summary judgment, we'll be talking about that at a later time.

22 With respect to the FTC's nonconsent to scheduling a  
23 hearing on December 7th, I understand. And the – the objection  
24 is noted for the record.

25 Now, Mr. Sacks, you said you can get your papers out

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1 tomorrow. That'll be fine. Get your papers out tomorrow. And  
2 the FTC can have till the 30 – till the 3rd to respond. And any  
3 reply will come by the debtor by the 4th.

4 MR. MORA: Thank you, Your Honor.

5 MS. DIEMER: Your Honor?

6 THE COURT: Yes.

7 MS. DIEMER: Could I just ask that if the FTC and the  
8 receiver do take any action related to appeal of this order that  
9 they include POL on any service list?

10 THE COURT: Could you do that, please, Mr. Oetzell and  
11 Mr. Mora?

12 MR. OETZELL: Sure.

13 THE COURT: Thank you very much.

14 MR. MORA: Yes, Your Honor.

15 THE COURT: All right. Well, thank you. Court is  
16 adjourned.

17 And, Mr. Sacks, get me your injunction.

18 Mr. Oetzell, I understand your concern. And if you  
19 want to move to amend the order because the order is a  
20 restriction in a way that you feel like you can't live with,  
21 I'll consider it at the time.

22 MR. OETZELL: I understand, Your Honor. My concern is  
23 also that this does not –

24 THE COURT: I can't hear you. You've got to talk more  
25 loudly and into the mic.

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1 MR. OETZELL: I understand Your Honor. Thank you.  
2 But my concern is also that this does not in any way address the  
3 problems of inconsistent results as between the District Court,  
4 the Eleventh District and this Court.

5 THE COURT: The Eleventh Circuit. Yes, well, I – the  
6 only thing I'm doing is deciding likelihood of success on the  
7 merits and, you know, the standards for an injunction in order  
8 to keep the funds blocked. And I understand that it's your  
9 position that that's somehow inconsistent with the District  
10 Court or – or the Eleventh Circuit's nonaction. The Eleventh  
11 Circuit has only denied a stay but hasn't issued findings of  
12 fact or conclusions of law in terms of why it did that. Isn't  
13 that correct, Mr. Oetzell?

14 MR. OETZELL: That is correct, Your Honor.

15 THE COURT: Okay.

16 MR. OETZELL: But it also has taken upon itself a  
17 rather large raft of issues.

18 THE COURT: I understand. Thank you, sir, very much.

19 MR. OETZELL: Thank you, Your Honor.

20 THE COURT: Court is adjourned.

21 [COUNSEL]: Thank you, Your Honor.

22 (The hearing was adjourned at 4:27 o'clock p.m.)

23 –o0o–

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State of California )  
 ) SS.  
County of San Joaquin )

I, Susan Palmer, certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages, of the digital recording provided to me by the United States Bankruptcy Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify I am not a party to nor in any way interested in the outcome of this matter.

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Dated December 10, 2007